

FILE COPY

Office - Supreme Court, U. S.

FILED

FEB 21 1938

CHARLES CLIFFORD CROPLEY
CLERK

No. ~~1000~~ 9

Supreme Court of the United States

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW
YORK, EXECUTOR OF THE ESTATE OF
MARY T. RYAN, DECEASED,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME
COURT OF APPEALS OF VIRGINIA AND BRIEF
IN SUPPORT THEREOF.

JAS. R. CASKIE, *Attorney for Petitioner.*

INDEX TO PETITION AND BRIEF

	PAGE
Petition for Writ of Certiorari.....	1
A. Summary of Matter Involved.....	1
B. Jurisdiction	4
C. The Issue	4
D. Reasons Relied on for Allowance of Writ.....	5
1. Importance of Question	5
2. Applicable Decisions and Conflicts.....	5
3. Discrimination	8
E. Time of Application.....	9
Brief in Support of Petition for Writ of Certiorari.....	11
I. The Opinion of the Court Below.....	11
II. Jurisdiction	11
III. Statement of the Case.....	12
IV. Specifications of Error.....	13
V. Argument	14
A. The Same Income Was Subject to Taxation by Two States	15
B. The State of New York Had the First and Only Right to Tax.....	18
C. The Due Process and Equal Privilege Provisions of Fourteenth Amendment Forbid the Tax.....	18
1. Due Process Clause Prohibition Violated....	18
2. Equal Privileges Clause Violated.....	24
Conclusion	29

TABLE OF CASES

	PAGE
<i>Baldwin v. Missouri</i> , 281 U. S. 586.....	6, 18
<i>Beidler v. South Carolina Com.</i> , 282 U. S. 1.....	6, 18
<i>Bell's Gap. R. R. Co. v. Pennsylvania</i> , 134 U. S. 232.....	25
<i>Binney v. Long</i> , 299 U. S. 280.....	28
<i>Chalker v. Birmingham, etc. R. Co.</i> , 249 U. S. 522.....	27
<i>Concordia Fire Ins. Co. v. Illinois</i> , 292 U. S. 535.....	27
<i>Farmers Loan & T. Co. v. Minnesota</i> , 280 U. S. 204,	6, 7, 18, 21, 22, 23
<i>First Nat'l Bank of Boston v. Maine</i> , 284 U. S. 312.....	6, 7, 19, 22
<i>Frick v. Pennsylvania</i> , 268 U. S. 473.....	6, 18
<i>Galveston v. Texas</i> , 210 U. S. 317.....	7, 20
<i>Gulf, etc. Ry. Co. v. Ellis</i> , 165 U. S. 150.....	26
<i>Klein v. Board of Tax Supervisors</i> , 282 U. S. 19.....	18
<i>Lawrence v. State Tax Com.</i> , 286 U. S. 276.....	7, 8, 19, 23
<i>Louis K. Liggett Co. v. Lee</i> , 288 U. S. 517.....	27
<i>Louisville Gas & Elec. Co. v. Coleman</i> , 277 U. S. 32.....	26
<i>Macallen Co. v. Massachusetts</i> , 279 U. S. 620.....	7, 20
<i>Maguire v. Trefry</i> , 253 U. S. 12.....	6, 15, 16, 19
<i>New Jersey Bell Tel. Co. v. State Board</i> , 280 U. S. 338.....	7, 20
<i>People of New York v. Graves</i> , 300 U. S. 308.....	7, 8, 19, 21
<i>Pollock v. Farmers Loan & Trust Co.</i> , 157 U. S. 429.....	7, 20
<i>Puget Sound P. & L. Co. v. King Co.</i> , 246 U. S. 22.....	10
<i>Quaker City Cab Co. v. Pennsylvania</i> , 277 U. S. 389.....	7, 20
<i>Safe Deposit & Trust Co. v. Virginia</i> , 280 U. S. 83.....	6, 15, 18
<i>Senior v. Braden</i> , 295 U. S. 422.....	6, 16, 19, 20
<i>Stewart Dry Goods Co. v. Lewis</i> , 294 U. S. 550.....	28
<i>Union Refrigerator Co. v. Kentucky</i> , 199 U. S. 194.....	6, 18
<i>United States v. Gormez</i> , 1 Wall. 690.....	10

STATUTES

Judicial Code (U. S.), Section 237B.....	4
Act of February 13, 1929 (U. S.).....	4
43 Stat. (U. S.) 937.....	4
U. S. C. Title 28, Sec. 3501.....	9
Virginia Tax Code, § 50.....	3
Virginia Tax Code, §§ 24, 27, 38, 41.....	3, 13, 25
Virginia Code, § 5871.....	9
New York Tax Law, § 365.....	3

Supreme Court of the United States

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW
YORK, EXECUTOR OF THE ESTATE OF
MARY T. RYAN, DECEASED,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI.

May It Please the Court:

The petition of Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, deceased, respectfully shows to this Honorable Court:

A.

SUMMARY OF THE MATTER INVOLVED.

Your petitioner respectfully shows that it is aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, rendered on the 25th day of November, 1937, in the cause of *Mary T. Ryan* (now deceased) v. *Commonwealth of Virginia*. By said judgment the Court upheld as valid, additional State income taxes aggregat-

ing \$3,996.57 assessed against Mary T. Ryan on income received for the years 1980, 1981 and 1982.

The additional assessment had been paid under protest and action was instituted for a refund based on the contention (inter alia) that the assessment and taxes were invalid and unconstitutional under the provisions of the Fourteenth Amendment to the Constitution of the United States which protect against double taxation by one or more states of the same subject and against unjust and unfair discrimination against a beneficiary of a discretionary trust as compared with the beneficiaries of other or direct trusts.

For original petition see Record, page 24, and for Stipulation of Facts under which the matter was tried see Record, page 30.

Mary T. Ryan was a beneficiary of a trust set up under the will of Thomas F. Ryan, a resident of New York. The trust was set up under the laws of, and wholly managed, operated, and controlled in New York. (Rec., p. 82.) The will (Exhibit A with Record) divided the trust estate into fifty-four equal parts. It provided for the payment of the entire net income from prescribed numbers of such parts to designated beneficiaries, but in the provision for Mary T. Ryan (the wife of testator) Article Fourth, Subdivision F of said will provided that the trustees should pay over to the said wife so much of the income from twelve of said parts

“as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine.” (See Stipulation of Facts, Rec., pp. 32-33.)

The Virginia law and the New York law dealing with taxation of Income on estates and trusts are identical in

terms. The New York law, being Section 365 of the New York Income Tax Law, is set out, Record, page 84. The pertinent portion of the Virginia Estate and Trust Income tax provision is found in Section 50 of the Virginia Tax Code (quoted in the opinion Rec., p. 46).

The decision of the Trial Court overruled the contention of the petitioner in that Court (Rec., pp. 35-36), which decision was affirmed by the Supreme Court of Appeals of Virginia. (Rec., pp. 43-44.)

Under the provisions of both the New York and Virginia laws the Trustees of a Trust estate pay no tax on income paid or payable to ordinary or direct beneficiaries, being allowed to deduct such income. As to income payable in the discretion of the trustees; however, the trustees are required to report and pay the tax on the entire net income to the state of the domicile of the trust.

It is stipulated that in the instant case the trustees were assessed by and paid to the State of New York for each of the years in question, income taxes on the entire net income from the 12/54th part of the trust estate provided for in the said Article Fourth, Subdivision F; of said will. (Rec., p. 32.)

Notwithstanding the assessment and payment of the tax in New York, the State of Virginia assessed and collected an additional tax for each of said years from Mary T. Ryan^o on the identical income, State taxes on which had already been assessed by and paid to the State of New York by the Trustees (Rec., p. 31).

This Virginia tax was assessed under Sections 38, 41, 24 and 27 of the Virginia Tax Code providing for income taxes on individual residents of the State, the said Mary T. Ryan being a resident of Virginia. The pertinent portions of last said sections will be found quoted in the opinion of the Court (Rec., p. 47).

4

Since the appeal to the Supreme Court of Appeals of Virginia, Mary T. Ryan has died and by order of that Court entered on February 5, 1988, the case was revived and Petitioner was substituted as a party in her place and stead (Rec., p. 44).

B.

JURISDICTION.

This cause draws in question the validity of the Statutes of Virginia imposing the taxes involved, it being claimed that such statutes are repugnant to the rights, privileges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States. The judgment of the Highest Virginia Court in which a decision could be had, was in favor of the validity of said statutes, and the case thus comes within the specific provisions of Section 287 B of the Judicial Code of the United States, as amended by the Act of February 18, 1929, Chapter 229, 48 Stat. 987, authorizing review by this Court.

C.

THE ISSUE.

This petition presents the issue as to whether the State of Virginia has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to assess an income tax on income received by the said Mary T. Ryan for the years in question, when the identical income in the hands of her Trustees had been assessed with income taxes by the State of New York, and which said taxes had been paid there, thus imposing two State taxes on the same income.

D.

REASONS RELIED ON FOR THE
ALLOWANCE OF THE WRIT.

1.

IMPORTANCE OF THE QUESTION INVOLVED.

The question of the right of two states to tax the identical income, one tax by the State of the domicile of the trust, and the other by the State of the domicile of the beneficiary, in case of a trust providing for payments to the beneficiary in the discretion of the Trustees is sought to be reviewed. The question is one of great importance, not only to the petitioner herein on account of the amount of the tax assessed in this case, and further on account of similar taxes for subsequent years, but is also important to the citizens of the country generally, similarly placed, and to the respective states, and is a question which in the judgment of the petitioner should be definitely settled by a decision in this Court.

The tax is of course an annual tax levied, or which would be levied in this case and any other cases of similar nature. Similar conditions, if not already existing, will doubtless be coming up from time to time in other jurisdictions.

Petitioner further claims that the decision of the Supreme Court of Appeals of Virginia, in upholding the right of Virginia to assess the second tax on the same income is contrary to and in conflict with decisions of this Court as hereinafter set out, and the matter should be reviewed by this Court to put the question at rest for the benefit of the citizens and of the various states.

2.

APPLICABLE DECISIONS AND CONFLICTS.

Petitioner has been unable to find any decision of this Court which directly decides the question involved. This

Court has decided in numerous cases that the Fourteenth Amendment to the Constitution of the United States prohibits the taxation by two or more states of the same subject, and that such double taxation deprives the owner of due process of law. (See *Union Refrigerator Company v. Kentucky*, 199 U. S. 194; *Frick v. Pennsylvania*, 268 U. S. 478; *Safe Deposit & Trust Company v. Virginia*, 280 U. S. 88; *Farmers Loan & Trust Company v. Minnesota*, 280 U. S. 204; *Baldwin v. Missouri*, 281 U. S. 586; *Beidler v. S. Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston v. Maine*, 284 U. S. 312; *Senior v. Braden*, 295 U. S. 422.)

In the case of *Maguire v. Trefry*, 258 U. S. 12, this Court held that the state of residence of a beneficiary could tax income from a trust of another state "to the extent that it had not been taxed by the state of the trust." It thus did not involve a question of double taxation on the same income. Even this holding was disapproved by this Court in the case of *Senior v. Braden*, *supra*, which stated that the decision in *Maguire v. Trefry* followed the decision in *Blackstone v. Miller*, 188 U. S. 189; and *Fidelity Trust Company v. Louisville*, 245 U. S. 54, which cases had been disapproved by later decisions of the Court (being the decisions cited above).

The opinion of the Supreme Court of Appeals of Virginia (Rec., p. 45) recognized the effect of the above decisions with reference to double taxation (Rec., p. 48), but attempts to distinguish on the ground that an income tax is not a property tax but an excise tax.

It is submitted that this attempt is without merit, because (a) In a Constitutional sense an income tax is a direct rather than an excise tax, and (b) the prohibitions apply equally as well to excise taxes:

(a) In a Constitutional sense income tax is not an Excise tax.

This Court has held that for the purpose of determining the constitutional question, the name of the tax, or its nature, as construed by the State Court is immaterial, and that this Court will decide for itself as to the effect of the tax. *New Jersey Bell Telephone Company v. State Board*, 280 U. S. 338, 346-347; *Galveston v. Texas*, 210 U. S. 217, 227; *Quaker City Cab Company v. Pennsylvania*, 277 U. S. 389; *Macallen Company v. Massachusetts*, 279 U. S. 620, 625.

While generally coming within the class of excise taxes yet an income tax does not

"fall within the class of excises, duties or imports, in the Constitutional sense, but is, in such a sense, a direct tax on property from which the income was 'derived'."

and the Court will disregard form and consider substance alone to prevent the violation of a Constitutional prohibition.

Brushaber v. Union Pac. R. Co., 240 U. S. 1, at pp. 16-17, where the question is discussed. To same effect see *Pollock v. Farmers Loan & Trust Co.*, 157 U. S. 429, 555-558, where the question is discussed.

(b) Constitution prohibitions apply equally to Excise taxes.

The same contention on the basis of Excise taxes was made and overruled by this Court in cases involving inheritance taxes (admittedly excise taxes).

See *Farmers Loan & Trust Co. v. Minnesota*, *supra*, and *First National Bank of Boston v. Maine*, *supra*.

The two cases chiefly relied on by the Virginia Court, viz.:

New York v. Graves, 300 U. S. 308, and *Lawrence v. State Tax Commission*, 286 U. S. 276 (Rec., pp. 49 and

50), are not applicable, nor do they have the force claimed. In neither case was there any double taxation by two states of the same subject.

In the *Graves* case one tax was on the principal asset and the other on the income—two subjects, and this was emphasized by the Court and determined the decision.

In the *Lawrence* case, no question of double taxation by two States was involved or suggested. The Court held that the State of Mississippi could tax the basic obligation from which the income was derived and so could tax the income therefrom.

It is submitted that the taxation by two states of the same income, under the decisions of this Court, comes within the prohibition of the Fourteenth Amendment.

8.

DISCRIMINATION.

Attention is called to the fact that under the construction of the New York and Virginia tax laws, identical in their terms as to estates and trusts, no beneficiary of a direct trust would pay the double taxation, whether residing in the same state of the trust, or in another state, since the trustee pays no tax on the income paid or payable to such beneficiary, being allowed to deduct from the total income all such income so paid or payable. In the case of the beneficiary of a discretionary trust residing in a different state than that of the trust, such income would always be subject to taxation by two separate states, thus destroying equality as between the two classes of beneficiaries, with no proper basis for such discrimination. The equal protection clause of the Fourteenth Amendment prohibits inequality in treatment of citizens. Decisions on this point will be found in the brief in support of petition filed herewith.

E.

TIME OF APPLICATION.

Attention is called to the fact that the instant case was pending at the Staunton Session of the Supreme Court of Appeals of Virginia, where it was heard. Decision was rendered at the Richmond Session on November 11, 1937. The order below was entered at Richmond on that date and certified to the Clerk at Staunton and entered in the Clerk's Office there in vacation on November 23, 1937. (Rec., pp. 43, 44.)

The authority of the Court to make the order at Richmond in vacation of the Staunton Session and certify it to the Clerk of Staunton is under Section 5871 of the Code of Virginia of 1919, the pertinent provision of which is as follows:

"The Court (sic. Supreme Court of Appeals) at any place of session may enter any order or decree in any cause originally docketed at any other place of session which it could enter if, in session at that place. When any such order or decree is made the Court shall have the same certified by the Clerk at the place where it is then sitting to the Clerk at the place where the cause was originally docketed, to be by him entered in the proper order book of the Court. All orders and decrees *when so made and entered shall have the same force and effect as if made and entered in term.*" (Italics supplied.)

The federal statute U. S. C. title 28, Sec. 3501, provides that no appeal of writ of certiorari shall be entertained unless application therefor "within three months after the *entry* of such judgment or decree." (Italics supplied.)

Thus while the order was dated November 11, 1937, it was not entered until November 23, 1937, which last date is the determination date from which the time be-

gins to run. See *Puget Sound P. & L. Co. v. King County*, 264 U. S. 22, 24-25.

United States v. Gormez, 1 Wall. 690, 698.

In consideration of the above, your petitioner respectfully prays that a Writ of Certiorari be issued out of, and under the seal of this Honorable Court, directed to the Supreme Court of Appeals of Virginia, at Staunton, Virginia, commanding that Court to certify and to send to this Court for its review and determination, on such day as may be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 1918, Mary T. Ryan, Petitioner, Plaintiff in Error v. Commonwealth of Virginia, Defendant in Error, and that the judgment of the Supreme Court of Appeals of Virginia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper and just, and your petitioner will ever pray.

GUARANTY TRUST COMPANY OF NEW YORK,

By JAMES R. CASKIE,

Attorney for Petitioner.

February 15, 1988.

Supreme Court of the United States

OCTOBER TERM, 1937.

**GUARANTY TRUST COMPANY OF NEW
YORK, EXECUTOR OF THE ESTATE OF
MARY T. RYAN, DECEASED,**

PETITIONER,

v.

**COMMONWEALTH OF VIRGINIA,
RESPONDENT.**

**BRIEF IN SUPPORT OF
PETITION FOR A WRIT OF CERTIORARI.**

I.

THE OPINION OF THE COURT BELOW.

The majority opinion of the Supreme Court of Appeals of Virginia will probably appear in 169 Virginia. It is already printed in 193 S. E. (Adv. Ops.) 534. The opinion is set forth verbatim in the Record, beginning page 45.

II.

JURISDICTION.

1. The appellate jurisdiction of the Supreme Court of the United States is invoked under Section 237(b) of the Judicial Code of the United States, as amended by the Act of February 18, 1925 (28 U. S. C. A., Sec.

844 (b)), to correct error of the Supreme Court of Appeals of Virginia in the case just referred to under I.

2. Final judgment of the Supreme Court of Appeals of Virginia, which is the highest Court of the State of Virginia in which a decision could be had, was entered in the Supreme Court of Appeals at Staunton, Virginia, at which point the case was pending, on November 23, 1987. (Record, pages 43-44.)

3. The case at bar comes within the appellate jurisdiction of this Court under the said Section 287 (b) of the Judicial Code, by reason of the fact that there was drawn in question the validity of the Virginia statutes imposing a second tax on income previously taxed by the State of New York, thus imposing two State taxes on the same income, and also causing an unjust and unfair discrimination against the beneficiary of a discretionary trust, as compared with other beneficiaries, all contrary to the due process and equal privilege provisions of the first clause of the Fourteenth Amendment to the Constitution of the United States; and the decision of the State Court sustained the validity of the statutes. The case thus sets up a claim of a violation of the rights, privileges and immunities protected under the Constitution of the United States.

III.

STATEMENT OF THE CASE.

The facts are distinctly stated in the petition for Writ of Certiorari. Mary T. Ryan, a resident of Virginia, was the beneficiary under a trust set up under the laws of the State of New York, pursuant to the provisions of the will of Thomas F. Ryan, a resident of New York. Under the law of New York, identical with the law of Virginia, trusts and estates are required to file reports for income taxes, such trusts being allowed credit

for income paid or payable to direct beneficiaries. As to income payable under the provisions of a trust in the discretion of the trustees, either as to amount or time of payments, the Trustees are required to pay an income tax to the state of domicile of the trust (in this case New York) on the total net income available for payments to the beneficiary. The Virginia law, sections 88, 41, 24 and 27 of the Virginia Tax Code (Rec., p. 47), provides for income taxes to be paid by residents, and Section 24 provides that the income shall include

"gains or profit and income derived from estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares . . ."

Acting under these statutes applicable to resident individuals, the State of Virginia assessed against Mrs. Mary T. Ryan income taxes covering income received for the years 1980, 1981 and 1982, aggregating \$8,996.57. The income was the identical income on which the Trustees had been assessed by the State of New York, and had paid income taxes for each of the years in question.

The case was heard under Stipulation of Facts (Rec., p. 30), which disclosed the above.

The claim of constitutionality of the assessment was based on decisions of this Court construing the due process and equal privilege provisions of the Fourteenth Amendment to the Constitution of the United States, which prohibit taxation by two or more states of the same subject and discrimination in taxation without logical and proper basis for classification.

IV.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Appeals of Virginia erred in holding that the Virginia statutes under which additional income taxes were assessed against Mary T. Ryan

for the years in question were valid and the tax assessed thereunder did not deprive the said Mary T. Ryan of privileges and immunities guaranteed by the Constitution of the United States.

2. The Supreme Court of Appeals of Virginia erred in affirming the decision of the lower Court, and in refusing to order a refund of the taxes which had been erroneously demanded of and paid by the said Mary T. Ryan.

3. The Supreme Court of Appeals of Virginia erred in holding that the said tax was valid on the grounds that it was an excise tax and not a property tax.

4. The Supreme Court of Appeals of Virginia erred in refusing to order a refund of the taxes paid as aforesaid.

V.

ARGUMENT.

The above four specifications of error all depend upon the question of the validity of the assessment of the income taxes by the State of Virginia under the provisions of the Due Process clause and Equal Privilege clauses of the Fourteenth Amendment to the Constitution of the United States, and can thus be treated jointly under the following heads:

A. The same income was subjected to taxation by two States.

B. The State of New York had the unquestionable right to levy the assessment, which thus prohibited the right in the State of Virginia.

C. The provisions of the Fourteenth Amendment protected against such taxation by both States on the same income (1) because forbidden by the Due Process clause to said Amendment; (2) because forbidden by the Equal Privilege clause to said Amendment.

A.

The same income was subjected to taxation by two States.

It is noted that the income assessment by the State of New York was made against, and required to be paid by the trustees of the trust estate under the provisions of the New York law, requiring such assessment and payment, where income was payable in the discretion of the trustees, as to time and amount. In the case at bar, since Article IV, Subdivision F, of said will (Exhibit A) provided that the trustees should pay so much of the income from twelve-fifty-fourths of the trust estate to Mary T. Ryan (the wife of the testator), as the said trustees in their sole discretion might determine to be necessary and proper for her care, support and comfort during her life, and in such installments and at such intervals as they in their sole discretion might determine, the tax was properly assessed there.

The trust estate was set up under the will of Thomas F. Ryan, a resident of New York; the trustees were residents of New York; the trust estate was located in, managed, operated, and controlled in New York and under the laws of the State of New York. (See Stipulation of Facts, Rec., p. 32.)

It would seem that there can be no doubt of the right of the State of New York to tax income from the New York trust. It would have the unquestionable right to tax the basic assets, and Virginia would have no such rights, as was specifically decided in *Safe Deposit & Trust Company v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59. In the case of *Maguire v. Trefry*, 259 U. S. 12, 64 L. Ed. 739, 40 S. Ct. 417, the Court upheld the taxation by the State of Massachusetts on income received by a resident of that State, which arose from estate held in trust in Philadelphia "to the extent to

which it had not been taxed by the State of the trust." Thus, there was no double taxation involved.

In the case of *Senior v. Braden*, 295 U. S. 422, 79 L. Ed. 1520, 55 S. Ct. 800, the question involved was the right of the State of Ohio to levy a tax against the holder of beneficial interest in several properties conveyed to trustees, some within the State of Ohio, and some without. The tax involved was a tax based on income from these trust interests. The Court held that the tax was invalid, saying that the State being without power to tax interest in lands situated beyond its borders, it could not consistently with the due process clause tax as intangible property trust certificates representing interest in parcels of land which were outside of the State. In this *Senior v. Braden* case, the Court discussed the case of *Maguire v. Trefry*, and specifically disapproved that case, stating that it was based on *Blackstone v. Miller*, 188 U. S. 189, 47 L. Ed. 489, 23 S. Ct. 277; and *Fidelity & C. Trust Company v. Louisville*, 245 U. S. 54, 62 L. Ed. 145, 88 S. Ct. 40; and that those cases have been disapproved by *Farmers Loan & Trust Co. v. Minnesota*, 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98, and that they were not in harmony with *Safe Deposit & T. Co. v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59, and "views now accepted here in respect to double taxation." The effect of this decision in disapproving *Maguire v. Trefry*, was to hold that the assets of the trusts and income from the trusts were localized at the domicile of the trust, and taxable only there. Certainly, there is no suggestion, and could not well be, that the State in which the trust was domiciled could not tax, if it should so provide, both the assets and income of a trust. In fact, we know of no case in which any other contention has even been suggested, nor any one who has had the hardihood to make any contrary contention.

That the State of New York had the right to tax, there would seem to be no question, and thus if the Fourteenth Amendment is to protect against the taxation of the same income by two states, the Virginia taxation would be invalid.

The contention was made and suggested in the opinion of the Judge of the Circuit Court of Nelson County (Rec., p. 85), that the case is similar to the case of corporate dividends where the state of the domicile of the corporation levies a tax on its income, and the state of the residence of the stockholder taxes the stockholder on the dividends received from the corporation. The difference between the two is manifest. The corporation, as a separate entity, owns its assets and the stockholder has no right to the income of the corporation as such, as it can be used by the corporation for any corporate purposes, and the right of the stockholder only comes when the dividends are declared by the corporation, either out of the income of the particular year in question, or out of surplus. In the case of a trustee, the assets are really owned by the beneficiaries and the trustee merely acts as a fiduciary agent for the purpose of investment and collection of the income and distribution thereof. He has no right to withhold any part of the income, but it belongs to and must be paid to the beneficiary. In other words, the income of the corporation is not owned by the stockholders in the sense that it must be paid to them, while the income of the trust is owned by the beneficiaries and must be distributed to them. Thus, when the trustee pays a tax on income, he is paying a tax on property owned directly by the beneficiaries, and when another state assesses another tax, it is taxing the identical income which has already been taxed by the other state. It is true that in a broad sense the stockholders own the corporation, but it is only in a broad sense. They have no right to demand delivery of the entire net

income of the Corporation to them. The Corporation itself determines how much it will pay out in the way of dividends.

In the case of *Klein v. Board of Tax Supervisors*, 282 U. S. 19, at page 23, Mr. Justice Holmes states as follows:

"There is no doubt that a state may tax a corporation and also tax the holders of its stock . . . the owners are different and . . . the property is different." (Italics supplied.)

B.

The State of New York had the first, and thus the only right to levy the assessment.

This point is covered in the discussion last above, and is also involved in the discussion next below and must not be further treated here.

C.

The Due Process and Equal Privilege provisions of the Fourteenth Amendment forbid the tax.

1. The Due Process clause prohibition.

As stated in the petition for Writ of Certiorari, this Court has decided in numerous cases that the Fourteenth Amendment prohibits the taxation by two or more states of the same subject, and that such double taxation deprives the owner of due process of law. See *Union Refrigerator Company v. Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36; *Frick v. Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603; *Safe Deposit & Trust Company v. Virginia*, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59; *Farmers Loan & Trust Company v. Minnesota*, 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98; *Baldwin v. Missouri*, 281 U. S. 586, 74 L. Ed. 1056, 50 S. Ct. 436; *Beidler v. S. Carolina Tax Commission*,

282 U. S. 1, 75 L. Ed. 181, 51 S. Ct. 54; *First National Bank of Boston v. Maine*, 284 U. S. 812, 76 L. Ed. 818, 52 S. Ct. 174; and *Senior v. Braden*, 295 U. S. 422, 79 L. Ed. 1520, 55 S. Ct. 800.

As shown above, the taxation here is unquestionably based on the identical income. The only case we can find dealing with the question of taxation of income by the State of residence of a beneficiary of a trust, when such income is received from the trust of another state, is the case of *Maguire v. Trefry*, *supra*, which, as shown, held that the state of the residence of the beneficiary could tax income to the extent that it had not been taxed by the state of the trust, and which holding, however, was disapproved, as shown above, in the case of *Senior v. Braden*, *supra*.

The opinion of the Supreme Court of Appeals of Virginia recognized the authorities against the taxation by two states of the same subject, but attempted to evade the effect of these decisions on the ground that the taxation here is of a different nature, and that an analysis of the recent cases in this Court shows that each turns upon the *situs* of the property for taxation, that the tax in the instant case is an excise tax, and not a property tax, and therefore it does not come within the condemnation of the Fourteenth Amendment. For this position the opinion cites the cases of *Lawrence v. State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102; and *People of the State of New York v. Graves*, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 409. (See opinion Rec., pp. 49-50.)

The case at bar is not to be distinguished in principle from the decisions upholding the prohibitions of the Fourteenth Amendment against taxation by two states of the same subject, for the reason that, while income taxes are generally classed as excise taxes, yet in the Constitutional sense, they are regarded as direct taxes,

and further, because, even though an excise tax, the Court disregards the form and goes to the substance, in order to prevent an evasion of Constitutional prohibitions.

This Court has held in numerous cases, that for the purpose of determining Constitutional questions, the name of the tax, or its nature, as construed by the State Court, is immaterial, and that this Court will decide for itself as to the effect of the tax. See *New Jersey Bell Telephone Company v. State Board*, 280 U. S. 338, 346-347, 74 L. Ed. 468; 50 S. Ct. 111; *Macallen Co. v. Massachusetts*, 279 U. S. 620, 625, 73 L. Ed. 874, 49 S. Ct. 432; *Quaker City Cab Co. v. Pennsylvania*, 277 U. S. 889, 72 L. Ed. 927, 48 S. Ct. 558; *Galveston v. Texas*, 210 U. S. 217, 227, 52 L. Ed. 1081, 28 S. Ct. 638.

The same principle was announced in the case of *Senior v. Braden*, *supra*, where the Court said:

"The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities and not with nomenclature." See page 429 of 295 U. S. and additional authorities there cited.

In the case of *Brushaber v. Union Pacific Railway Co.*, 240 U. S. 1, at pages 16-17, 67 L. Ed. 620, 43 S. Ct. 268, the question of an income tax as being an excise tax was discussed by the Court. The Court there said again that it would disregard form and consider substance alone to prevent the violation of Constitutional prohibitions, and that while income taxes generally come within the class of excise taxes, yet an income tax does not "fall within the class of excises, duties, or imports in the Constitutional sense, but is in such a sense a direct tax on property from which the income was derived." To the same effect see *Pollock v. Farmers Loan & Trust*

Company, 157 U. S. 429, 555-558, 39 L. Ed. 759, 15 S. Ct. 768.

Thus, from the above it clearly appears that in considering the question of constitutional prohibitions an income tax is not regarded as an excise tax, but is a direct tax on the property from which the income is derived. As the property was all located and taxed in New York, the Virginia tax on the income would in a constitutional sense be a tax on the property located in New York, and therefore invalid.

The prohibitions of the Constitution apply equally as well to taxes unquestionably classed as excise taxes, where the effect of such tax would be contrary to the Constitutional provisions.

The same effort to escape the effect of the Constitutional provisions on the ground that the taxes are excise and not property taxes has been advanced in other cases without success, as the Court under the above principal looks to the substance and not to the name or form.

In *Farmers Loan & Trust Company v. Minnesota*, *supra*, the tax was an inheritance tax, admittedly an excise tax. The specific contention was made that the tax was an excise tax, as of course in a general sense it was. The Court, in dealing with the question held that the right of any state to tax may depend somewhat upon the power of another state to tax. The concurring opinion of Mr. Justice Stone specifically held that the tax was an excise tax, or a privilege tax imposed for the transfer of intangibles. The decision in the case overruled the contention that the tax would be valid because an excise tax, and the opinion of Mr. Justice McReynolds states as follows:

"Taxation is an intensely practical matter and laws in respect to it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined

that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation any more than one placed similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The Court then held that the State of New York, having assessed its inheritance tax on the basis of the identical bonds involved in the case, the State of Minnesota could not assess a like excise tax on the basis of the same bonds, even though there might normally be a basis or jurisdiction to tax the transfer of debts owed by persons or corporations domiciled within its borders, or otherwise within its control.

In the case of *First National Bank of Boston v. Maine*, the same contention was raised, that the tax was an excise tax (this time on the stock of corporations incorporated in the State of Maine, which thus had jurisdiction to levy an excise inheritance tax on the transfer of such stocks). The opinion of the Court in that case referred to the case of *Farmers Loan & Trust Company v. Minnesota*, and adopted the same principles, saying that though stocks and bonds were different in their nature, yet the principles of law applied as well to stocks as to bonds, and though the stocks would have to be transferred in Maine, which would normally have the jurisdiction to tax, yet two excise inheritance taxes could not be assessed on the basis of the same assets.

Thus, in the instant case, while income tax is in the constitutional sense a direct and not an excise tax, yet if considered an excise tax, the principles enunciated would apply equally as well as they did in the two cases

cited last above. Otherwise there would be two excise taxes levied on the same identical income.

Certainly, there would appear to be no just reason why there should be a distinction against income, as compared with other property. Two taxations on income is just as unjust and oppressive in its consequences as two state taxes on any other property, or property rights.

It is submitted that the two cases cited by the Virginia Court in its effort to distinguish the instant case in principle from the decisions of this Court do not have the effect intended, and in fact do not militate against or conflict with the decisions of this Court with respect to two taxations on the same subject. The case of *Lawrence v. State Tax Commissioner*, *supra*, cited by the Virginia Court in its opinion (Rec., p. 49) involved the question of the right of the State of Mississippi to tax income received by its resident, a contractor, from work done in another state. No question of double taxation was involved. The decision of the Court simply held that Mississippi would have a right to tax the income (there being no suggestion that it had been taxed in the other state) and referred to the fact that the State of Mississippi would have had the right to tax the basic asset in the way of debt or obligation due to the resident of Mississippi for the work done in the other state, and that it could therefore naturally tax the income.

In the instant case it must be admitted that the State of Virginia would have no right to tax the basic assets from which the income was derived, and it would not be contended to the contrary. The Constitutional question involved here would only have been pertinent in the *Lawrence* case, if there had been attempt by both states to tax the same income, in which case the principle above referred to as enunciated in the case of *Farmers Loan & Trust Company v. Minnesota*, would have been brought

into operation, namely, that the right of one state to tax may depend somewhat upon the power of another to do so.

In *People of the State of New York v. Graves*, *supra*, cited by the Virginia Court, there was likewise no question of double taxation involved. In that case the property was located in another state. The owner lived in New York. The state of the locus of the property had assessed a property tax on the property itself, but nothing on the income. The State of New York had assessed an income tax against the owner, who was a resident of New York. The Court held, and properly held, that income and the basic property constituted separate subjects of taxation, and the fact that the other state had assessed a tax on the property itself did not prohibit the State of New York from assessing a tax against its resident on the income. That case would be pertinent and relevant to the case at bar, if the State of New York had assessed the basic assets (already assessed in the other state) and had not assessed on the income. In the case at bar the State of New York had assessed a tax on the income and Virginia assessed a *second tax on the same income*.

It is respectfully submitted that the effort of the Supreme Court of Virginia to differentiate the case at bar from the effect of the principles enunciated in the decisions of this Court cited above is ineffective, and that the contention of petitioner should have been upheld and the tax assessed by the State of Virginia should have been held invalid under those decisions.

(2) The tax is likewise invalid under the Equal Privilege clause of the Fourteenth Amendment.

In the instant case under the tax laws of both New York and Virginia, which are identical, trustees of trust estates must make up and file their income tax reports. They pay no tax, however, on income payable to or

dinary beneficiaries. As to income payable in the discretion of the trustees; however, the trustees are required to pay income tax on the entire net income, and for each of the years in question the trustees in New York paid the tax on the income there. The State of Virginia, under the statutes applicable to resident individuals; imposed an income tax against Mrs. Ryan in respect to the same income, the tax on which had already been paid in New York. The two taxes resulted, not from specific requirement of double taxation, but from the effect of the operation of the law, in that the Virginia law for individual income taxes provides for a tax on the net income, including income from trusts. See Virginia Tax Code, Section 24 (Rec., p. 47). If this provision is carried to its logical conclusion, the result would be that Virginia itself would impose two taxes on the same income from a discretionary trust, since it would tax income in the hands of the trustee, under the specific provisions of the law with reference to trusts, and would then tax the beneficiary again, even though the trust were a Virginia trust and the beneficiary were a resident of Virginia. As against this, trust income payable to an ordinary beneficiary would be so subjected, whether the beneficiary received the income from a New York trust or from the Virginia trust, since it is provided that the Trustees may deduct from the income, the income paid or payable to such direct or ordinary beneficiaries.

It is respectfully submitted that there is no fair basis for differentiating between the income payable in the discretion of the trustees and income specified to be paid to other beneficiaries, and that such a result contravenes and is prohibited by the Equal Privilege clause of the Fourteenth Amendment to the Constitution.

Since the decision of this Court in *Bell's Gap Railroad Co. v. Pennsylvania*, 184 U. S. 232, 88 L. Ed. 599, 16 Sup. Ct. 443, clear and hostile discrimination without

proper basis has been held to be prohibited by the equal privilege clause. In that case Mr. Justice Bradley, speaking for the entire Court, while upholding the tax in that case, used the following language:

"But clear and hostile discrimination against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

The Court has recognized the right of the states to classify subjects, provided the classification has a proper and logical basis, and to prescribe different taxes on such classifications. However, in *Gulf, etc. Ry. Co. v. Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255, this Court held that for such classification to be valid it

"must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

This formula has been recited in a number of other cases, and has been applied in determining what difference in tax was based on proper classification and what was not.

○ In *Louisville Gas & Elec. Co. v. Coleman*, 277 U. S. 82, 72 L. Ed. 770, 48 S. Ct. 428, the question was as to the validity of a tax on recording of mortgages. It applied only to mortgages which did not mature within five years. The tax was attacked as contrary to the Equal Privilege clause of the Fourteenth Amendment. The Court held the tax invalid and laid down the rule in regard to legislative classifications, as follows:

"... mere difference is not enough: the attempted classification must always rest upon some difference which bears a reasonable and just relation to

the act in respect to which the classification is proposed . . . " page 37 of 277 U. S.

The Court said further, in reply to the contention that there was a difference in the privilege enjoyed, since the longer term mortgage enjoyed the privilege longer:

"Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from one who enjoys a like privilege for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the former, produces an obvious and gross inequality."

In the case of *Concordia Fire Insurance Company v. Illinois*, 292 U. S. 585, 78 L. Ed. 1411, 54 S. Ct. 880, it was held that a statute taxing the net receipts of a foreign fire insurance company, could not validly be applied to receipts from casualty insurance because no similar tax was levied on the receipts of foreign casualty insurance corporations. The Court in this case enforced the same principles as set out above.

In the case of *Chalker v. Birmingham, etc. R. Co.*, 249 U. S. 522, 68 L. Ed. 748, the State of Tennessee attempted to levy a higher occupation tax upon construction companies whose principal offices were without the State than on similar companies whose offices were in the State. The Court could see no substantial difference in the methods of conducting the business, and hence held the statute unconstitutional under the equal privilege clause.

In the case of *Louis K. Liggett Company v. Lee*, 288 U. S. 517, 77 L. Ed. 929, 58 S. Ct. 481, the question of

a Florida chain store tax was involved. The Court upheld the tax graduation according to the number of stores, but on the second point in the case decided that the equal protection clause forbade the imposition of a higher tax on a chain operated in more than one county than upon a chain with the same number of outlets operated all in the same county. Mr. Justice Roberts, in the opinion, stated that this classification "finds no foundation in reason or in fact of business experience." (See page 584 of 288 U. S.)

This Court, in the case of *Stewart Dry Goods Company v. Lewis*, 294 U. S. 550, 79 L. Ed. 1054, 55 S. Ct. 525, held that the equal protection clause prohibited the statute invoked, which levied a tax upon gross receipts from all retail sales at rates varying according to the amount of sales. Mr. Justice Roberts wrote the opinion of Court, and pointed out that the classification was based upon a difference neither in the method of conducting a business nor in its nature, but solely upon variations in the total amount of sales made within a year. He said that to levy a higher tax upon a sale made in December than upon one made in January, or upon that of a large merchant than upon a small competitor, is "whimsical and arbitrary," as would be a progressive property tax upon land (see p. 557 of 294 U. S.).

In the case of *Binney v. Long*, 299 U. S. 280, 81 L. Ed. 239, 57 S. Ct. 201, the question involved was the validity of a classification in inheritance taxation, based upon the effective date of the dispositive instrument. One question raised was as to the validity of a tax upon the succession to property resulting from the failure of the donee to exercise a power of appointment created by a deed *inter vivos* in 1862. The Supreme Court held that to tax the successor to this interest would be to deny to him the equal protection of the laws, because the succession to a like interest created by a similar non tes-

mentary gift made subsequent to 1907, would not be taxed at all. The Court could see no reasonable basis for this discrimination.

It is respectfully submitted that there is no proper basis for the discrimination in the case at bar against the beneficiary of a discretionary trust and the beneficiary of an ordinary trust. Both are ordinary citizens falling in the same class. They use their income and money in the same manner according as their judgments may dictate. There is thus no fair basis for the discrimination which becomes arbitrary, unjust, and oppressive, and therefore within the condemnation of the equal privilege clause of the Fourteenth Amendment.

CONCLUSION.

In consideration of all of the above, it is respectfully insisted that the case at bar is one calling for the exercise by this Court of its supervisory powers to correct the error of the Supreme Court of Appeals of Virginia, in deciding a Federal question of substance in a manner which is out of accord with the applicable decisions of this Court as above set out, and that Writ of Certiorari should be granted, to the end that this Court may review the decision of the Supreme Court of Appeals of Virginia, and reverse it.

Respectfully submitted.

JAMES R. CASKIE,

*Attorney for Guaranty Trust
Company of New York,
Executor of the Estate of
Mary T. Ryan, deceased.*

Lynchburg, Va.,
February 15, 1938.